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NTSB Order No. EA-3591

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 26th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-9137

RUSSELL WISLER, d/b/a
UNIVERSE AIR CARGO,

Respondent.

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge Patrick G. Geraghty, issued from the bench at the conclusion of an evidentiary hearing held May 10, 1989.¹ We deny the appeal.

By that decision, the law judge affirmed an order (complaint) the Administrator issued on March 4, 1988, and that he amended substantially in January 1989, concurrently with his filing of a reply to respondent's motion to dismiss the complaint

¹An excerpt from the transcript containing Judge Geraghty's decision and order, together with a portion of the transcript containing his findings, is attached. The law judge incorporated by reference other findings he made during the course of the hearing. They can be found throughout the transcript.

under the stale complaint rule, 49 C.F.R. 821.33. The complaint, as amended, ordered revocation of respondent's air carrier operating certificate, issued under Title 14, Part 135 of the Federal Aviation Regulations ("FAR"). Revocation was premised on numerous violations of the FAR pertaining to maintenance and airworthiness.²

By order of January 13, 1989, the law judge denied respondent's motion to dismiss, determining that the allegations in the amended complaint presented an issue of lack of qualifications. Following the May 10th hearing, the law judge found that the evidence established all the violations alleged. He determined that, although respondent might have been willing to comply with applicable regulations, he was unable to do so. Tr. at pps. 195, 202. Finding that safety in air commerce or air

²As originally filed, the Administrator's complaint charged respondent with violations of the airworthiness provision, § 91.29(a), and § 91.33(b)(9). The complaint addressed various violations in connection with two aircraft used in cargo-carrying operations. It cited: a malfunctioning fuel gauge, cylinder head gauge, and alternator; a missing interior door handle (replaced by vise grips), missing window crank knobs, and an inoperative cowl flap and vacuum pump.

The amendments added counts, added new FAR violations, and added aircraft. Respondent acknowledged the Administrator's right to file the January 1989 amendments. January 14, 1989 Motion for Postponement, at p. 2.

At the hearing, FAA counsel again sought to amend the complaint, both adding and deleting material. The law judge again admitted (over respondent's objections) all amendments, save one. Respondent has not appealed this action.

As amended, the order charged respondent with violations of FAR sections 39.3, 91.29, 91.33, 91.165, 91.167, 135.5, and 135.21. Pertinent text of these regulations is set forth in the appendix.

transportation and the public interest required it, the law judge affirmed the revocation.

On appeal, respondent pursues the argument, rejected by the law judge, that the complaint must be dismissed as stale. Respondent also contends that the record cannot support revocation, citing Essery v. NTSB, 857 F.2d 1286 (9th Cir. 1988), and arguing that most of the discrepancies charged are minor,³ and that revocation is inconsistent with the FAA's internal procedure, citing Compliance and Enforcement Handbook, Order 2150.3A.

Respondent avers that revocation will be an inconvenience to the public, will affect the livelihoods of 17 employees, will harm banks and suppliers, and will result in the blacklisting (see FAR § 135.13(b)) of an individual who has built his career in aviation.⁴ Nevertheless, we note that, but for the engine

³Respondent contends that the most serious of the violations -- exceeding the engine overhaul time limit -- can be explained in terms of an error in the documentation. He attaches to his brief two documents, exhibits the law judge refused to admit, to establish the company's engine overhaul time as appropriate.

We will not consider this evidence. Respondent did not appeal the law judge's rejection of it, nor has he explained why that action was error. Moreover, allowing it at this time would require that we permit the Administrator to respond on the merits. Even if respondent were correct and this one finding unfounded, it would not affect the ultimate conclusion, which is based on numerous other violations.

⁴"Part 2" of respondent's appeal raises numerous administrative law and constitutional issues the Board will not address. Administrator v. Rochna, NTSB Order EA-3184 (1990) at P 3, aff'd Rochna v. NTSB, 929 F.2d 13 (1st Cir. 1991). We n&e, in any event, that most of these arguments were made there by respondent's counsel and were uniformly rejected by the court.

overhaul time limit item addressed supra, respondent does not offer any argument against any of the law judge's findings of fact underlying the violations.

We address first the threshold issue of dismissal. In view of preeminent safety concerns, our so-called stale complaint rule, requiring dismissal in certain circumstances, applies only to suspension, not revocation actions. The rule (at 49 C.F.R. 821.33) provides, in pertinent part:

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations stale or timely, are assumed to be true. . . .

(2) If the law judge deems that an issue of lack of qualifications would be presented by any or all of the allegations, if true, he shall proceed to hearing on the lack of qualification issue

Lack of qualification can be shown in one of two ways: 1) a continuing pattern of conduct showing disregard for the regulations or a lack of compliance disposition; or 2) conduct during one incident that is sufficiently egregious to demonstrate lack of qualification. Administrator v. Wingo, 4 NTSB 1304 (1984) . We review the Administrator's charges in the aggregate and determine whether, if true, the issue of lack of qualification has been adequately raised. Administrator v. Konski, 4 NTSB 1845 (1984).

Although in his brief respondent offers no reasons why the Administrator's case should not be found, as did the law judge, to raise a lack of qualification issue and, therefore, be exempt

from the stale complaint rule, we have nevertheless reviewed the matter. We agree with the law judge's conclusion. The content of the complaint as of January 1989 raises sufficient allegations that, if proven, demonstrate a lack of qualification. These maintenance and equipment violations are extensive and demonstrate a continuing pattern of disregard for regulations that are critical to an effective safety programs

Having rejected respondent's procedural claim, we turn to his arguments that, in the circumstances, revocation is improper. Not only does Essery not preclude revocation here, the number and pattern of violations are entirely consistent with other cases in which certificates have been revoked. As the Administrator points out, the facts in Essery were considerably different, and did not rise to the level of violations that exists in this case. Here the violations are even more egregious than in, for example, Administrator v. National Air College, NTSB Order EA-3012 (1989), where revocation was ordered.⁶

Respondent also claims that revocation is inappropriate because, if his activities were so offensive, emergency revocation would have been sought. Respondent's argument proves too much. It cannot prevail if only because it would read the

⁵Even if we looked only at the original complaint, its charges could be sufficient to demonstrate the kind of disregard for the FARs for which revocation is an appropriate remedy.

⁶See also Administrator v. North Coast Aviation, Inc., NTSB Order EA-3200 (1990), and Administrator v. Charter Flight Service, Inc., NTSB Order EA-3131 (1990), both of which involved fewer violations than are at issue here.

FAA's non-emergency revocation authority out of the statute. And, contrary to respondent's argument, the lack of harm or injury does not control the sanction sought. Administrator v. Guy America Airways, 4 NTSB 888, 891-892 (1983).⁷

Respondent's claim that revocation is also inconsistent with the FAA's internal policies (i.e., its enforcement handbook) has been addressed judicially and rejected in ConnAire v. Secretary, 887 F.2d 723 (6th Cir. 1989). The court agreed with our conclusion (see Administrator v. Connaire, Inc., NTSB Order EA-2716 (1988) at p. 12) that "the Board's role is not to evaluate the Administrator's enforcement program in terms of the FAA Enforcement Manual (Order 2150.3)."

In sum, our conclusions in Guy are equally applicable to and supported by the record in this case. The number and nature of the violations raise a genuine concern as to the overall safety of the carrier's past air services, and show a pervasive and serious disregard for the FAR requirements. Multiple violations cannot realistically be explained as isolated infractions due to oversights, but rather to a deficient attitude concerning both air safety and the regulations. See Guy, supra, at 892.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's revocation order and the initial

⁷We caution respondent's counsel accurately to report cited cases. Not only was his citation to this case in error, his brief implies that it represents a contrary view.

decision are affirmed.

3. The revocation of respondent's air carrier operating certificate shall begin 30 days from the date of service of this order.⁸

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸For the purposes of this order, respondent must physically surrender the certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

APPENDIX

Title 14, § § 39.3, 91.29, 91.33, 91.165, 91.167, 135.5, and 135.21

Pertinent parts of the invoked regulations are as follows:

§ 39.3 "No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive."

§ 91.29¹ "(a) No person may operate a civil aircraft unless it is in an airworthy condition."

§ 91.33² "(a) . . . [N]o person may operate a powered civil aircraft with a standard category U.S. airworthiness certificate in any operation described in paragraphs (b) through (f) of this section unless that aircraft contains the instruments and equipment specified in those paragraphs (or FAA-approved equivalents) for that type of operation, and those instruments and items of equipment are in operable condition.

(b) **Visual flight rules (day).** For VFR flight during the day, the following instruments and equipment are required:

(9) Fuel gauge indicating the quantity of fuel in each tank."

§ 91.165³ "Maintenance required.

Each owner or operator of an aircraft -

(a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter;

(b) Shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service;

(c) Shall have any inoperative instrument or item of equipment, permitted to be inoperative by § 91.213(d)(2) of this

¹Now codified at § 91.7(a).

²Now § 91.205.

³Now § 91.405.

required inspection; and

(d) When listed discrepancies include inoperative instruments or equipment, shall ensure that a placard has been installed as required by § 43.11 of this chapter."

§ 91.167⁴Operation after maintenance, preventive maintenance, rebuilding, or alteration.

(a) No person may operate any aircraft that has undergone maintenance, preventive maintenance, rebuilding, or alteration unless -

(1) It has been approved for return to service by a person authorized under § 43.7 of this chapter; and

(2) The maintenance record entry required by § 43.9 or § 43.11, as applicable, of this chapter has been made."

§ 135.5 "Certificate and operations specifications required.

No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part. . . ."

§ 135.21 "Manual requirements.

(a) Each certificate holder, other than one who uses only one pilot in the certificate holder's operations, shall prepare and keep current a manual setting forth the certificate holder's procedures and policies acceptable to the Administrator. . . .

(d) A copy of the manual., or appropriate portions of the manual (and changes and additions) shall be made available to maintenance and ground operations personnel by the certificate holder and furnished to-

(1) Its flight crewmembers; and

(2) Representatives of the Administrator assigned to the certificate holder."

⁴Now § 91.407.